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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-7534

BRUCE E. BORRI,

Petitioner,

versus

ELAINE M. SIVERSON, Previously known as
ELAINE M. BORRI,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

Petitioner, BRUCE E. BORRI, respectfully prays for a Writ of Certiorari to the Supreme Court of the State of Florida to review its judgment affirming the ruling of the Trial Court below which granted custody of the parties minor child to the Respondent.

OPINION BELOW

The Circuit Court (Trial Court) for Duval County, Florida, entered a Final Judgment of Dissolution of Marriage between the parties but did not make a ruling on custody of the parties minor child since the child was beyond the

jurisdiction of the Court. This ruling was an unpublished opinion and it is attached as Appendix A to the Petition for Writ of Certiorari. Thereafter, the Superior Court of New Jersey, Chancery Division, of Morris County, entered an Order granting custody of the parties minor child to the Petitioner herein, BRUCE BORRI. That is also an unpublished opinion and it is attached here as Appendix B.

Fourteen days after the New Jersey Order, the Circuit Court of Duval County entered an Order granting custody of the parties minor child to the Wife/Respondent. This was an unpublished opinion and is attached as Appendix E. An Order denying a rehearing on the matter was filed in an unpublished report by the Circuit Court of Duval County, Florida on July 5th, 1974. That Order is attached and marked as Appendix F.

Thereafter, the First District Court of Appeal of the State of Florida entered a Per Curiam Order affirming the aforementioned Order of the Circuit Court. This was an unpublished opinion and is attached as Appendix H. The Florida Supreme Court then granted a Petition for Writ of Certiorari to the District Court of Appeal, First District, in an unpublished opinion entered on March 29th, 1976, and attached hereto as Appendix I. On June 16th, 1976, the Supreme Court of Florida in an unpublished opinion then discharged the Writ of Certiorari. That Order is attached hereto as Appendix J. Finally, in another unpublished opinion, the Supreme Court of Florida denied the Petitioner's Petition for a Rehearing on September 7th, 1976. That opinion is attached hereto as Appendix K.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The Order sought to be reviewed in this case is the Supreme Court of Florida denying the Petition for Writ of Certiorari entered on June 16th, 1976, and thereby upholding the Order of the Circuit Court of Duval County, Florida, giving custody of the parties minor child to the Wife/Petitioner. An Order denying a Petition for Rehearing was entered on September 7th, 1976 by the Supreme Court of Florida. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari is 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED FOR REVIEW

Must a custody decree in one state be accorded Full Faith and Credit in a sister state?

CONSTITUTIONAL PROVISIONS INVOLVED

Involved is Article 4, Section 1, of the United States Constitution which provides

> "Full Faith and Credit shall be given in each state to public acts, records, and judicial proceedings of every state. And the Congress may by general laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof."

STATUTES INVOLVED

Involved is 28 U.S.C. Section 1738 which states that:

"The Acts of the legislature of any State, Territory or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory, or Possession thereto."

"The records and judicial proceedings of any Court of any such State, Territory, or Possession, or copies thereof, shall be proved or admitted in other Courts within the United States and its Territories and Possessions by the attestation of the Clerk and Seal of the Court and next if a Seal exists, together with a certificate of a Judge of the Court that the said attestation is in proper form."

"Such acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every Court within the United States and its Territories and Possessions as they have by law or usage in the Court of such State, Territory or Possession from which they are taken."

PREFACE

The instant case deals with the all to common phenomena of child theft by a non-custodial parent, in complete disregard of a Child Custody Order rendered by one state in order to transport the child to another state where a Court will award custody of the child to the non-custodial parent. As the law stands now, a Custody Order rendered by a state is, for all practical purposes, worthless. There is nothing at the present time to prevent the non-custodial parent from removing the child from the jurisdiction of the state which rendered an un-

favorable custody order. There is nothing which enables a state to effectively enforce a custody order, and as the law is interpreted at the present time by many states, there is nothing that requires a state to enforce a custody order entered by a sister state. As long as this situation continues to exist, the non-custodial parent will continue to be encouraged to abduct his children from unfavorable jurisdictions.

This Court has been faced with this problem on four separate occasions, *Ford v. Ford,* 371 U.S. 187 (1972); *Kovacs v. Brewer,* 356 U.S. 604 (1958); *May v. Anderson,* 345 U.S. 528 (1953); and *Halvey v. Halvey,* 330 U.S. 610 (1947), but has avoided dealing with the real question raised, to-wit: must a state accord Full Faith and Credit to a child custody order rendered by a sister state. Numerous newspaper articles, law review articles, and even television commentaries, have dealt with this question, and have all concluded that it is time for this problem to be resolved.

The Petitioner respectfully urges this Court to clarify any confusion regarding this issue, and to settle this issue once and for all.

PRELIMINARY STATEMENT

The parties will be referred to in this Brief as follows: the Husband, BRUCE E. BORRI, shall be referred to as the Petitioner/Husband, and the Wife, ELAINE M. SIVERSON, previously known as ELAINE M. BORRI, shall be referred to as the Respondent/Wife. The Record on Appeal will be referred to by the Letter "R" followed by the applicable page number. The Transcript of the Proceedings will be referred to as "T" followed by the

applicable page number. The Appendix will be referred to as the Appendix followed by the applicable Appendix number.

STATEMENT OF THE CASE

On August 27, 1973, a Final Judgment of Dissolution was entered in the Circuit Court of the Fourth Judicial Circuit, dissolving the marriage between the Petitioner/Husband and the Respondent/Wife herein (Appendix A). The Court at that time did not award custody of the parties minor child, GREGORY, to either party, because as the Court noted:

> "GREGORY MICHAEL BORRI, the minor child of the parties, is and was at the time of the institution of this suit in the State of New Jersey, beyond the jurisdiction of this Court, and in the custody of the father who has been supporting him." (Appendix A -- Paragraph C).

Thereafter, in September of 1973, the Respondent/Wife went to New Jersey and hired an attorney in an attempt to obtain custody of the parties minor child, GREGORY (T-21, 23, 45, 122). As a result of the Respondent/Wife's Petition for Custody, a temporary hearing was held on November 9, 1973, where the New Jersey Court ruled that the Petitioner/Husband had temporary custody of the parties minor child (T-47, 60, 130, 220). Additional hearings were held in the New Jersey Court on March 27, 1974; May 8, 1974; and May 20, 1974 (T-35, 60, 123). On May 20, 1974, the Honorable Kenneth C. MacKenzie, Judge of the Superior Court of New Jersey, Chancery Division, Morris County, entered an Order giving the Petitioner/Husband custody of the parties minor child, GREGORY (T-32). (Appendix B)

On May 9, 1974, the Respondent/Wife forcibly removed the parties minor child, GREGORY, from his babysitter's home in New Jersey and brought him down to Florida (T-28, 29, 123, 148, 187-192). On May 10, 1974, the Respondent/Wife filed a Petition for Modification of Final Judgment in the Florida Courts, seeking to obtain custody of the parties minor child (R-21, 22). A hearing was held on May 22nd and May 23rd in Jacksonville, Florida. Prior to that hearing, the Petitioner/Husband's attorney filed an Amended Motion to Dismiss (Appendix L). The Amended Motion to Dismiss alleged in part:

> "2. The Husband, BRUCE E. BORRI, has heretofore been granted the permanent custody of the minor child by final Order of the Superior Court of New Jersey, in and for Morris County. The Wife, ELAINE M. BORRI, instituted the proceedings in the State of New Jersey and therefore submitted herself to the jurisdiction of that Court and is bound by its decision, *Lambertson et ux. v. Williams*, 61 So. 2d 478 (FL 1952)."

Furthermore, at the hearing, the attorney for the Husband/Petitioner argued that this Order was binding on the Court, (T-7, 13). As the attorney for the Wife/Respondent herein stated at that hearing,

> "I think what we really have here . . . is a question of Full Faith and Credit of a custody Order that has been entered by its sister state . . ." (T-14).

At the conclusion of the hearing, Judge Santora stated that

> "There is no question that foreign judgment effecting custody of minor, particularly when you are talking about temporary custody, it is not binding upon the Florida Courts." (T-258, 259).

The attorney for the Husband/Petitioner again raised the Full Faith and Credit issue in his Petition for a Rehearing (R-43-45). On June 4, 1974, the Honorable John E. Santora, Jr., Circuit Judge of the Fourth Judicial Circuit in and for Duval County, Florida entered an Order granting the Respondent/Wife custody of the parties minor child (Appendix E). In that Final Order Judge Santora did not recognize the Final Order entered in New Jersey on May 20, 1974.

On June 14, 1974, the Petitioner/Husband filed a Motion for Rehearing (R-43-45). On July 5, 1974, the Honorable John Santora denied the Petitioner/Husband's Motion for a Rehearing (Appendix F).

Thereafter, the Petitioner/Husband filed an Appeal with the District Court of Appeal of the State of Florida, First District, to review Judge Santora's Order in which he failed to give Full Faith and Credit to the New Jersey Order of May 20, 1974. On June 18, 1975, the District Court of Appeals of the State of Florida, First District, entered a Per Curiam Order affirming Judge Santora's decision (Appendix H). Thereafter, the Petitioner/Husband filed a Petition for Writ of Certiorari to the District Court of Appeal, First District, with the Supreme Court of the State of Florida. The Petition was granted on March 29, 1976 (Appendix I). Thereafter on June 16, 1976 the Supreme Court of the State of Florida discharged the Writ of Certiorari in a Per Curiam decision (Appendix J). The

Petitioner/Husband filed a Petition for a Rehearing with the Supreme Court of the State of Florida, and the Petition for Rehearing was denied on September 7, 1976 (Appendix K). This case is now properly before this Honorable Court under 28 U.S.C. Section 1257.

STATEMENT OF THE FACTS

On August 27, 1973, the marriage between the Petitioner/Husband and the Respondent/Wife was dissolved in the Circuit Court of the Fourth Judicial Circuit of the State of Florida, in and for Duval County (Appendix A). The Court did not enter a custody order at that time, because at the time of the institution of the divorce petition, the parties minor child, GREGORY, was in the State of New Jersey in the custody of the Petitioner/Husband herein (Appendix A).

In September, 1973, the Respondent/Wife hired an attorney in New Jersey and initiated proceedings attempting to obtain custody of GREGORY, R-21, 22, 23, 45, 122). The Respondent/Wife herein, initiated this action in New Jersey, and submitted herself to the jurisdiction of the New Jersey Courts for the purpose of determining custody of GREGORY (T-54). On November 9, 1974, an Order was entered in the New Jersey Courts granting temporary custody of the parties minor child, GREGORY, to the Petitioner/Husband until a final hearing was held (T-47, 60, 130, 218, 220).

At the time of this temporary Order, GREGORY BORRI, the parties minor child, was approximately two years old (T-44). He was living with his father, the Petitioner/Husband, in the home of his father's parents (T-161). The home is located in a small New Jersey Town

with the population of approximately 2,000 people (T-158). The home is located on a private dead-end road where there is little or no traffic (T-159, 161). It is a ranch-type house with five rooms and a bath located on one and a half acres with plenty of room for children to play (T-159, 160). The home is occupied by the Petitioner/Husband, the Petitioner/Husband's Father, and the Petitioner/Husband's Brother (T-158, 160).

The Petitioner/Husband works for the New Jersey Bell Telephone Company from 8 to 5, Monday through Friday (T-235, 238). While the Petitioner/Husband was at work, GREGORY was kept by a Marilyn Greensway, who is the Respondent/Wife's Sister (T-182, 183). Mrs. Greensway lives about two or three miles from the Petitioner/Husband's house in New Jersey (T-181). Mrs. Greensway's home has a big yard, swings, and a good clean house for children (T-151, 185). Mrs. Greensway also has three young children of her own, ages 4, 6, and 7 (T-150, 182). Every witness who knew Mrs. Greensway stated that she was a very moral, loving person who takes excellent care of children (T-51, 52, 150, 162).

GREGORY would be brought home at 4:45 p.m. by the Petitioner/Husband's Father who works in the area (T-167). The Petitioner/Husband gets home at approximately 5:30 p.m. and spends all of his time with GREGORY (T-164, 238). Every single person who testified in this hearing testified that the Petitioner/Husband was an excellent Father who was fit to have custody of GREGORY, and loved GREGORY very much. The Respondent/Wife stated that the Petitioner/Husband loved his child and was a good Father (T-105). She stated that she was sure GREGORY loved his Father (T-156). She stated that she knew nothing in the background of

Marilyn Greensway, or the Borri family that would render their homes an unfit place for GREGORY to live (T-151, 152). Marilyn Greensway, the Respondent/Wife's own sister testified that the Petitioner/Husband was quite able to care for his son and that she knew nothing in his background that would render him unfit to take care of his child (T-185, 186). Mr. Maitland O'Ralley, the manager of the apartments where the Petitioner/Husband lived when he was living in Florida, knew of nothing about the Petitioner/Husband that would make him a bad Father (T-79).

After the temporary custody Order was entered on November 9, 1973, the New Jersey Circuit Court Judge had ordered the Division of Family Services to make an investigation into the background of both of the parties (T-221). The Respondent/Wife was interviewed in Florida in November of 1973 (T-254), and the Petitioner/Husband was interviewed in January of 1974 (T-222). Following this investigation, three hearings were held in New Jersey. The first hearing was held in March of 1974, lasting about two and a half to three hours (T-35, 60, 125). The next hearing was held on May 8, 1974, again lasting about three hours (T-35, 60, 123). The final hearing was held on May 20, 1974 (T-60). At these hearings, the New Jersey Courts benefited from the testimony of the Respondent/Wife, Petitioner/Husband, the Respondent/Wife's new husband, Kenneth Siverson, a Mr. and Mrs. Perry, who are residents of New York, but who lived in Florida at one time and knew the Respondent/Wife as a mother, the testimony of a child psychologist, a report from the Division of Social Services of New Jersey, the agency which made the background investigation into both of the parties, the testimony of Gerogana Borri, the Petitioner/Husband's

Mother, and the testimony of Marilyn Greensway, the Respondent/Wife's Sister (T-22, 121, 126, 224, 229). In other words, the hearings in New Jersey were quite extensive, quite involved, and quite thorough.

On May 9, 1974, the Respondent/Wife, who initiated the proceedings in the New Jersey Courts, and in flagrant disregard of the November 9, 1973 Order by the New Jersey Court, surreptitiously removed GREGORY from the home of Marilyn Greensway, who was babysitting for GREGORY at the time, and brought GREGORY back to Florida (T-28-31, 123, 187-192) The Respondent/Wife took GREGORY from the home of Marilyn Greensway, got in the car with her new husband, Kenneth, (they were married on February 14, 1974) and drove to the airport and flew him to Florida (T-31, 190, 191). The Respondent/Wife immediately filed her Petition to Modify the Final Judgment of Dissolution on May 10, 1974 (R-21, 22). The New Jersey Order granting custody to the Petitioner/Husband was then entered on May 20, 1974 (R-32).

In Florida, two three hour hearings were held on May 22, 1974 and May 23, 1974. The witnesses which appeared at that hearing are apparent from the record. However, it is apparent that the Circuit Court Judge in Florida was without the benefit of the report from the Division of Family Services in New Jersey which conducted a special investigation under the background of both parties (T-260).

The Respondent/Wife lives in a two bedroom apartment in Jacksonville with her new husband, her two-year old stepson, and her son GREGORY (T-43, 44). She works from 8:30 to 5:00 p.m. While she is at work GREGORY stays in a nursery in Jacksonville, (T-144). Her new husband, Kenneth Siverson, is a drapery installer with his own company (T-95).

A more specific reference to facts will be made during Argument.

REASONS FOR GRANTING THE WRIT AND AMPLIFYING THE SAME

The New Jersey Order dated May 20, 1974 granting custody of the parties minor child to the Petitioner/Husband, was not accorded Full Faith and Credit by the Florida Court at a hearing on May 22, 1974, and as such the Florida Order of June 4, 1974 granting custody to the Respondent/Wife is violative of Article 4, Section 1 of the United States Constitution. On May 20, 1974 a New Jersey Court, which had jurisdiction over the parties and the subject matter hereto, entered an Order granting custody of the parties minor child to the Petitioner/Husband herein (Appendix B). That Order was entered at the instant of the Respondent/Wife, who went to New Jersey where the child was living, and filed a Motion for Custody (T-21, 23, 45, 122). On June 4, 1974, just fifteen days after the rendition of the aforementioned New Jersey Order, Judge John E. Santora entered an Order granting custody of the parties minor child to the Respondent/Wife (Appendix E). In that Order, Judge Santora completely disregarded the May 20, 1974 Order entered by the New Jersey Court. Judge Santora specifically stated, "I do not consider the May 20, 1974 Order as the effective date for a change in circumstances." (Appendix E, Page 12a).

The Petitioner/Husband respectfully submits that this decision patently violates Article 4, Section 1 of the United States Constitution. That section provides that:

"Full Faith and Credit shall be given in each state to public acts, records and judicial proceedings of every state. And the Congress may be general laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof."

In addition, 28 U.S.C. section 1738 provides that:

"The Acts of the legislature of any State, Territory or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory, or Possession thereto."

"The records and judicial proceedings of any Court of any such State, Territory, or Possession, or copies thereof, shall be proved or admitted in other Courts within the United States and its Territories and Possessions by the attestation of the Clerk and Seal of the Court and next if a Seal exists, together with a certificate of a Judge of the Court that the said attestation is in proper form."

"Such acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same Full Faith and Credit in every Court within the United States and its Territories and Possessions as they have by law or usage in the Court of such State, Territory or Possession from which they are taken."

Surprisingly, this Honorable Court has never ruled on the question of whether a child custody order in one state

must be accorded Full Faith and Credit by a sister state. However, this Court has dealt with cases closely touching on this issue, and it appears from the language in those cases that this Court is of the opinion that Article 4, Section 1 of the United States Constitution requires Courts of one state to grant Full Faith and Credit to a child custody order of a sister state.

The first such case dealing with this issue presented to this Court was *Halvey v. Halvey*, 330 U.S. 610 (1947). In that case, the parties were married in 1937 and lived together until 1944 when the Wife moved without the Husband's consent to the State of Florida. In 1945, a Petition for Divorce was instituted in the State of Florida by the Wife. The Husband was served by publication, he did not appear at the hearing, and one day before the final hearing he took the child to New York. On the next day the Wife was given custody of the child, and the Wife then went to New York and filed a Habeas Corpus Petition there seeking return of the child. The New York Court ordered that the child remain with the mother but the father was given certain visitation rights which he was not granted in the Florida Final Judgment. The Wife filed a Petition for Writ of Certiorari in this Court attempting to overturn those portions of the New York Final Judgment awarding the father certain visitation rights of the parties minor child.

This Court affirmed the Order of the New York State Court in modifying the Florida Divorce Decree. This Court specifically withheld a ruling on "whether the state which has jurisdiction over the child may, regardless of a custody decree rendered by another state, make such orders concerning custody as the welfare of the child from time to time requires." This Court based its opinion on the

grounds that the Florida Court would have been able to modify the divorce decree in order to give visitation rights to the Husband. Furthermore, the justices involved in that case noted that there was considerable question over Florida's power to make a ruling concerning custody and visitation of the child in the first place, because of the fact that the domicile of a child at that time was with the domicile of the father, and that there was not a full hearing with all parties present in Florida concerning the question of custody and other problems.

In the majority opinion, which was delivered by Mr. Justice Douglas, the Court did note the general rule that:

> "This command (Full Faith and Credit clause) requires the judgment of a sister state to be given full, not partial credit in the state of the forum." *Halvey v. Halvey, Supra* Page 614

Justice Douglas went on to say that the modification was allowed because:

> "It is not shown that the New York Court in modifying the Florida Decree exceeded the limits permitted under Florida law. There is therefore a failure of proof that the Florida Decree receive less credit in New York than it had in Florida." *Halvey v. Halvey, Supra* Page 615

Mr. Justice Frankfurter in a separate concurring opinion stated that:

> "If there were no question as to the power of Florida to provide for the custody of this child in

> the manner in which the Florida Decree of Divorce did, I think, New York would have to respect what Florida Decreed, unless changed conditions affecting the welfare of the child called for a change in custodial care. New York could respond to such changed circumstances. The child's welfare must be the controlling consideration whenever a Court which can actually lay hold of a child is appealed to on behalf of the child. Short of that, a valid custodial decree by a Florida Court could not be set aside simply because a New York Court, on independant consideration has its own view of what custody would be appropriate." *Halvey v. Halvey, Supra* 617.

Justice Frankfurter also stated that:

> "On the slim record before us, I am not justified in finding that the New York Court of Appeals was unmindful of its duty under the Full Faith and Credit clause to respect the valid Florida Judgment." *Halvey v. Halvey, Supra* 618.

It appears as if the thrust of the Courts thinking in *Halvey v. Halvey* was that Full Faith and Credit must be accorded to a child custody decree, at least in those cases where the Court clearly had jurisdiction over the child, and where a full hearing with all parties present was held. In the case at bar, the New Jersey Courts had jurisdiction over all of the parties, and in fact, the Respondent/Wife herein is the person who initiated the proceedings in the New Jersey Court. A review of the record will also reveal that the New Jersey Court was very thorough in this matter, and in fact withheld any final rulings until an in-

vestigation could be made by the Division of Social Services of New Jersey.

This Court was again confronted with this issue in the case of *May v. Anderson,* 345 U.S. 528 (1953). In that case, the question presented was whether in a habeus corpus proceeding attacking the right of a mother to retain possession of her minor child, an Ohio Court must give Full Faith and Credit to a Wisconsin Decree awarding custody of the children to their father when that decree is obtained by the father in an ex parte divorce action in a Wisconsin Court which had no personal jurisdiction over the mother. Basically, what happened, is that the parties had resided in Wisconsin, at which time the mother moved to Ohio with the parties minor children. The father then filed for divorce in Wisconsin, and also sought custody of the parties minor children. The Wife was served in Ohio under a long-arm statute in Wisconsin permitting such action for divorce, but making no mention of the availability of the statute for a child custody proceeding. The Wife made no appearance and took no part in the Wisconsin proceeding, which divorced the parties and gave the father custody of the children. Armed with this decree, the father went to Ohio to obtain the children from the mother. The Ohio Court felt that it was obliged to recognize the Wisconsin Order under the Full Faith and Credit clause of the United States Constitution.

Mr. Justice Burton, in writing for the majority, held that the Ohio Court did not have to recognize the Wisconsin Custody Order, because the Wisconsin Custody Order was obtained when that state did not have personal jurisdiction over the mother. This Court stated that personal jurisdiction over the mother was necessary in order to cut off her right to custody of her children.

There were three dissenting justices in this case, Justice Jackson, Justice Reed and Justice Minton. Those justices were of the opinion that the Wisconsin Court did have sufficient jurisdiction over the parties to determine the question of custody, and as such, Ohio had to recognize the Wisconsin Decree under Article 4, Section 1 of the United States Constitution. As put by Justice Minton in his dissenting opinion,

> "The only question before the Ohio Court was whether that Court should give Full Faith and Credit to the Wisconsin Decree. That unappealed decision was valid on its face, and its validity was not attacked by any pleading. The validity of the decree is not affected by any admission in this case, on or off the record. As far as this record is concerned, the Decree of the Wisconsin Court was what it purported to be on its face. Since Appellant failed to challenge its validity by any pleading, the Decree was entitled to Full Faith and Credit in Ohio under Article 4, Section 1 of the United States Constitution." *May v. Anderson, Supra* 353

Again, it appears evident from this Court's opinion that the Wisconsin Custody Order would have been entitled to Full Faith and credit in Ohio if it were a valid Decree. Those justices that felt it was a valid decree felt that it should have been given Full Faith and Credit in Ohio. In the case at bar, again, there can be no question that the New Jersey Court had rendered a valid decree. The Court clearly had jurisdiction over all of the parties.

The next case to present this issue to this Honorable Court was *Kovacs v. Brewer,* 356 U.S. 604 (1958). In that case, the parties were granted a divorce in New York

Court on January 17, 1951. Custody of the parties minor child, Jane, was awarded to the Husband's Father, George Brewer, Sr., pending discharge of the Husband, George Brewer, Jr., from the Navy. As contemplated by the Decree, George Brewer, Sr. moved the child to his home in North Carolina where the child had resided ever since.

In November of 1954, the Mother, Mrs. Kovacs, filed a Petition in the New York Courts asking them to modify the Divorce Decree and grant her custody of the child. George Brewer, Jr. and George Brewer, Sr., both of whom were in North Carolina at the time, presented Affidavits in New York, although they did not appear at the hearing. Nevertheless, the New York Court modified its prior Order and granted the Wife custody. George Brewer, Sr. who still had custody of the child, refused to give up custody, and fourteen months after the Wife was granted custody by the New York Court, she went to North Carolina to enforce the New York Custody Decree. She alleged in the North Carolina proceedings that the New York decree was entitled to Full Faith and Credit, except as to matters showing a change of circumstances since the date of the New York Decree.

At the North Carolina hearing, all parties were present. Mr. Brewer presented some facts which had been presented to the New York Court by virtue of the Affidavits, but also presented some new facts concerning new circumstances since the New York Decree was entered in 1954. These new facts concerned the child's surroundings, school, church, etc. The North Carolina Trial Court concluded that on the basis of those facts presented to it it was not bound or required to give affect to the Decree in New York made in 1954, and allowed the child

to remain with George Brewer, Sr. The North Carolina Supreme Court agreed with the Trial Court, and also stated that the New York Decree was not binding because the New York Court had no jurisdiction to modify its original custody award after the child had become a resident and domiciliary of North Carolina.

This Court granted Certiorari to consider the claim that the North Carolina Court had failed to give Full Faith and Credit to the judicial proceedings of the State of New York. This Court again avoided the Constitutional issue and stated:

> "As presented, the case obviously raises difficult and important questions which we should postpone deciding as long as reasonable alternatives exist." *Kovacs v. Brewer, Supra* 607.

The Court then went on to say that it appeared that the North Carolina Court had decided the case on a change of circumstances since the 1954 Decree in New York. This Court remanded the case to the North Carolina Supreme Court with instructions to determine the issue of changed circumstances. This Court noted that if circumstances have changed since the 1954 New York Decree, then this Court would not have to decide the Constitutional issues raised.

It is clear that the Court did not want to confront the issue presented, if at all possible. However, it is equally clear that this Court inferred that a Custody Order of one state must be granted Full Faith and Credit in a sister state.

The most recent case decided by this Court which touched on this issue is *Ford v. Ford*, 371 U.S. 187 (1962). The litigation in that case started in 1959 when the Husband filed a Petition for Habeas Corpus in the State Courts of Virginia alleging that the Wife had the children but that she was not a suitable person to have the children and that he wanted a change of custody. The Wife filed an Answer. Thereafter, the parties, through their attorneys, negotiated and agreed that the Husband was to have custody of the children, with certain minor exceptions. This stipulation was filed with the Court, and the Court pursuant to this stipulation entered an Order dismissing the Husband's Petition. Nine months later, when the Wife was living in South Carolina and when she was exercising her visitation rights with the children, she filed a suit in the South Carolina Courts seeking custody of the children. The Husband filed an Answer saying that he was the fit and proper person to have custody of the children and he also stated that the Wife had breached their agreement in the Virginia Court and that the Wife had violated the Order of the Virginia Court.

The Judge in the South Carolina Court heard testimony from eleven witnesses, including the Husband and Wife, and he then granted custody to the Wife.

The Supreme Court of South Carolina reversed the Trial Courts ruling saying that had the Wife filed this action in Virginia she would have lost because of res judicata. Therefore, the Supreme Court of South Carolina stated that the Virginia judgment was entitled to Full Faith and Credit.

This Court again granted a Petition for a Writ of Certiorari to decide the Full Faith and Credit issue. However,

the Court was again unable to decide this case without reaching the Full Faith and Credit issue. This Court specifically stated:

> "Whether the South Carolina Court's interpretation of the Full Faith and Credit Clause is a correct one is a question we have previously reserved. We need not reach that question here." *Ford v. Ford, Supra* 192

This Court then reviewed the Virginia cases to see if an agreement in a child custody case is res judicata in Virginia. This Court concluded that Virginia law would not treat an agreement in a child custody case as res judicata, and therefore, the South Carolina Court did not have to treat the agreement as res judicata and did not have to grant Full Faith and Credit to the Virginia Decree.

It is again apparent, however, that this Court would have ruled that the Virginia Decree was entitled to Full Faith and Credit in South Carolina, if the Virginia Decree was res judicata in Virginia. However, since it was not res judicata in Virginia it obviously did not have to be res judicata in South Carolina, and therefore was not entitled to Full Faith and Credit.

Again, however, in the case at bar, the New Jersey Order was not the result of an agreement between the parties, but rather was the result of an extended and indepth child custody hearing initiated by the Respondent/Wife herein.

In spite of the clear leaning of this Court, the various states of this Union have taken different stands on the

issue of whether or not a custody order of one state is entitled to Full Faith and Credit in a sister state. Thirty-one states in the Union have held the child custody awards by Courts of sister states are entitled to Full Faith and Credit. Those states are Alabama, Arizona, Arkansas, Connecticut, Washington D.C., Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, North Carolina, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin and Wyoming, see *annot., Child Custody-Foreign Judgment,* 35 A.L.R. 3d 520, 535 through 540, in cases cited therein.

Nevertheless, there are still some states, including Florida, that fail and refuse to grant Full Faith and Credit to custody orders of sister states.

Numerous legal articles have been written concerning this problem, and by far the majority of them have taken the position that Full Faith and Credit should be granted to sister state custody orders, those articles point out that to do so would discourage abduction of children; would limit the waste of individual and social resources involved in relitigation; would provide greater psychological stability for the child; would protect the reasonable expectations of the prevailing parent, and would promote Federal cohesion. On the other hand, to fail to grant Full Faith and Credit to sister state judgments regarding custody would encourage multiple litigation and would, in fact, make a mockery out of state Court orders concerning custody. See COMMENT, *Legalized Kidnapping of Children by Their Parents,* 80 DICKENSON L. REV., 305; Bodenheimer, *The Rights of Children and the Crisis in Custody Litigation: Modification of*

Custody In and Out of State, 46 COLORADO L. REV., 495; Hudak, *Seize, Run, and Sue, The Ignominy of Interstate Child Custody Litigation in American Courts,* 39 MISSOURI L. REV., 521; Hecker, *Full Faith and Credit to Judgments; Law and Reason v. the Restatement Second,* 54 CAL. L. REV., 282; Ratner, *Legislative Resolution of the Interstate Child Custody Problem,* 38 SO. CAL. REV., 183; Stumberg, *The Status of Children in the Conflict of Law,* U. CHICAGO L. REV., 42; and Retmer, *Child Custody in a Federal System,* 62 MICH. L. REV., 795.

Again, in an attempt to give some force and effect to child custody orders rendered by the various states, the commissioners on uniform state laws adopted the Uniform Child Custody Jurisdiction Act in July of 1968, and this was later approved by the American Bar Association, National Conference of Commissioners on Uniform State Laws, UNIFORM CHILD CUSTODY JURISDICTION ACT (1968). The purposes of this act sets forth very valid reasons why child custody orders should be granted Full Faith and Credit. Those purposes, set forth in Section 1 of the act are:

> "(1) Avoid jurisdictional competition and conflict with Courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful affects on their well being;
> (2) Promote cooperation with the Courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child;
> (3) Assure that litigation concerning the custody of a child take place ordinarily in the

state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available, and that the Courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state;
(4) Discourage continuing controversies over a child custody in the interest of greater stability of home environment and a secure family relationship with the child;
(5) Deter abductions and other unilateral removals of children undertaken to obtain custody awards;
(6) Avoid relitigation of custody decisions of other states in this state insofar as feasible;
(7) Facilitate the enforcement of custody decrees of other states;
(8) Promote and expand the exchange of information and other forms of mutual assistance between the Courts of this state and those of other states concerned with the same child; and
(9) Make uniform the laws of those states which inacted."
Uniform laws Annotated, Matrimonial, Family and Health Laws, UNIFORM CHILD CUSTODY JURISDICTION ACT, 1968 Act, Page 103 (West Publication-1973).

This act has been passed in seven states, California, WESTS ANN. CIV. CODE, Sections 5150-5174; Colorado, C.R.S. 1973, 14-13-101 to 14-13-128; Hawaii, H.R.S. Sections 583-1 to 583-26; Maryland, CODE 1957 Art. 16, Sec-

tion 184 through 207; North Dakota, NDCC Sections 14-14-01, to 14-14-26; Oregon, ORS 109-700 to 109-930; Wyoming, W.S. 1957, 20-143 to 20-167.

This Court has inferred for many years that a child custody order is entitled to Full Faith and Credit in a sister state. However, since this Court has failed to specifically tackle this issue, there remains great confusion among the various states of the Union. Because of this confusion, litigants in child custody cases are encouraged to abduct their children from a jurisdiction which does not render a favorable custody order, and take the child to a state more favorable. For instance, in the case of *Allen v. Allen,* 200 Ore. 278, 268 P. 2d 358 (1954), the parties minor children were subject to seven separate custody hearings in nine years in the Courts of Oklahoma, California and Oregon. This confusion has literally made a mockery out of state orders, and has created a most unstable environment for the children who are continually dragged through various custody hearings. This chaotic condition has been the subject of numerous legal articles, newspaper articles, and television shows, many of which the Petitioner/Husband herein would present in a brief on the merits, should this Court grant certiorari.

As a result of the uncertainty in the law concerning custody orders, out of state visitation is often limited or restricted, for fear that the parent exercising his visitation rights will seek to obtain custody in his state when he is visiting with the children. As a matter of fact in the case at bar, the Respondent/Wife is most fearful that the Petitioner/Husband will initiate a custody proceeding in the State of New Jersey during visitation as reflected in

her Petition for Modification of Visitation Rights set forth herein in Appendix C. Additionally in the initial custody order entered by Judge Santora in this case prevents the Husband from removing the parties minor child from confines of two counties in the State of Florida (Appendix E). This order was later modified, but the Petitioner/Husband has had to post a $1,000.00 bond (Appendix G).

The case at bar is a good example of a situation which can result when Full Faith and Credit is not granted to the custody order of a sister state. The Respondent/Wife herein filed a Petition for Custody in the State of New Jersey, but being dissatisfied with the results therein, abducted the child from New Jersey and took him to a more favorable climate, to-wit: the State of Florida. Florida refused to grant Full Faith and Credit to the New Jersey Decree, and similarly it is obvious that the New Jersey Courts would refuse to recognize the Florida Decree of June 4th, 1974, since Florida refused to recognize the New Jersey Decree. Therefore, theoretically, the Petitioner/Husband herein could reabduct the child and take him back to New Jersey, and relitigate the issues again in the New Jersey Courts. As Justice Jackson set forth in his dissent in *May v. Anderson, Supra*, at Page 536:

> "A state law such as this, where possession apparently is not merely nine points of the law but all of them and self help is the ultimate authority, has little to commend it in legal logic or as a principal of order in a Federal system."

Justice Jackson also argued in *May v. Anderson* that in addition to parents personal custody rights, the child's

personal right to have his status determined with reasonable certainty is at stake in these cases, *May v. Anderson, Supra* at Page 541-42.

The Petitioner/Husband's position in this case is quite simple. The New Jersey Decree of May 20th, 1974 was entitled to Full Faith and Credit in the State of Florida at the hearings on the same matter on May 22nd and May 23rd of 1974. The Petitioner/Husband is asking only that the Florida Court recognize the New Jersey Order to the extent that the New Jersey Order would be recognized in its state. The Petitioner/Husband agrees with Justice Douglas' statement in the majority opinion of *Halvey v. Halvey, Supra* Page 614, wherein he stated:

> "So far as the Full Faith and Credit Clause is concerned, what Florida could do in modifying the decree, New York could do."

Clearly what New Jersey could do in this case with its May 20th, 1974 Order Florida could do. Furthermore, the Petitioner/Husband readily admits that in New Jersey a custody order may be changed at any time as future conditions and circumstances reasonably recommend, *Parwash v. Yousef*, 80 N.J. SUPER 133, 214 A. 2d 314 (1965); *Wojnarowicz v. Wojnarowicz*, 48 N.J. SUPER, 1958, 137 A. 2d 618 (1959). However, in the case at bar the Florida Court completely ignored the May 20th, 1974 New Jersey Order. The Petitioner/Husband's contention herein is that if there was a sufficient change in circumstances between the May 20th, 1974 New Jersey Order and the May 22, 1974 hearing in the State of Florida, then Florida could have modified the New Jersey Custody Decree and still given it Full Faith and Credit. Obviously, in two days a change of circumstances could not have occurred.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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BRUCE E. BORRI

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Attorney for Petitioner
BRUCE E. BORRI

APPENDIX A

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

IN RE THE MARRIAGE OF
BRUCE E. BORRI, husband,
and ELAINE M, BORRI, wife.

No. 73-4702-CA Division F

FINAL JUDGMENT OF
DISSOLUTION OF MARRIAGE

Filed: Aug. 27, 1973

From the evidence, the Court finds:

A. The Court has jurisdiction of the parties to and the subject matter of this action.

B. The marriage of the parties, Bruce E. Borri, husband, and Elaine M. Borri, wife, is irretrievably broken.

C. Gregory Michael Borri, the minor child of the parties, is and was at the time of the institution of this suit in the State of New Jersey, beyond the jurisdiction of this Court, and in the custody of the father who has been supporting him. This factor weighs heavily in the husband's favor in the Court's disposal of the use of the personal property hereinbelow mentioned since, of course, under Sec. 61.13(1), FSA, the wife likewise owes "a duty of support to a child of the marriage to pay such support as from the circumstances of the parties and the nature of the case is equitable."

D. The wife's net earnings for part-time work only are currently $74.00 weekly; whereas the husband's sole pres-

ent source of income is $81.00 weekly unemployment compensation check. He is daily seeking gainful employment; has been precluded from obtaining it because of the pendency of the instant suit; has been requested by the employers interviewed to "come back and we will see if we still have an opening"; and may "possibly" obtain $210.00 monthly in Veterans Administration benefits "if" he returns to school.

It is, therefore, ADJUDGED that:

1. The marriage of Bruce E. Borri, husband, and Elaine M. Borri, wife, is dissolved and each spouse is restored to the status of being single and unmarried.

2. Bruce E. Borri, the husband, shall continue to solely support the said Gregory Michael Borri until further order of the Court.

3. The wife's prayers for alimony and the allowance of an attorney's fee are both denied; but, understanding that the wife is not abandoning her claim for alimony, the Court specifically reserves jurisdiction to consider that particular issue at any appropriate future date.

4. The wife shall make available to the husband after 6:00 o'clock P.M., but before 9:00 o'clock P.M. of this day the following personalty, the use and possession of which is committed unto the husband:

(a) The stereo cabinet built by the husband and referred to in the evidence;
(b) The husband's tools;
(c) The crib of said minor child, a family heirloom; and
(d) The cameras loaned the husband by his parents.

5. The Court retains jurisdiction for the purpose of reconsidering, enforcing or modifying any provision of this judgment saving only the provisions of paragraph 1.

ORDERED at Jacksonville, Florida, on August 27, 1973.

/s/ CHARLES COOK POWELL, JR.
CIRCUIT JUDGE

cc: E. E. Durrance, Esq.
1279 Kingsley Ave., Suite 103
Orange Park, Florida 32073

Lyman T. Fletcher, Esq.
215 Washington Street
Jacksonville, Florida 32202

APPENDIX B

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, MORRIS COUNTY

ELAINE M. BORRI,
Plaintiff,

versus CA NO. M 3050-73

BRUCE E. BORRI,
Defendant.

ORDER FOR CUSTODY, ETC.

This matter coming on before the Court on an Order to Show Cause, Arnold H. Miniman, Esq. appearing for the plaintiff, and John J. Greco, Esq. appearing for the defendant, to determine custody of Gregory Michael Borri, an

infant child of a marriage existing between Elaine M. Borri and Bruce E. Borri, said marriage having been dissolved by a prior proceeding in THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA, BEARING DOCKET NO. 73-4702-ca DIVISION K; and the Court having taken the testimony of all of the parties and their witnesses, and having considered the arguments of counsel, and the Court having decided that it is in the best interests of the infant child of the marriage, GREGORY MICHAEL BORRI, that custody be with the father, it is on this 20th day of May 1974, ORDERED

That the father, BRUCE E. BORRI, is herewith awarded custody of said infant, GREGORY MICHAEL BORRI.

It is further ORDERED that there shall be no visitation granted to the plaintiff mother, ELAINE M. BORRI, until further Order of this Court.

/s/ KENNETH C. MACKENZIE
KENNETH C. MACKENZIE
Judge of Superior Court

I, MORTIMER G. NEWMAN, JR., Clerk of the Superior Court of New Jersey, the same being a Court of Record, do hereby attest that the foregoing is a true copy of the Order for Custody filed May 20, 1974, in the cause wherein Elaine M. Borri is the Plaintiff; and Bruce E. Borri is the Defendant, now on the files of my office.

IN TESTIMONY WHEREOF, I have hereto set my hand and affixed the seal of said Court, at Trenton, this 20th day of May, nineteen hundred and seventy-four.

/s/ MORTIMER G. NEWMAN, JR.
Clerk

I, Samuel D. Lenox, Jr., Judge of the Superior Court of New Jersey, do hereby certify that Mortimer G. Newman, Jr., whose signature is subscribed above, was, at the date thereof, and now is, the Clerk of the Superior Court of New Jersey, that foregoing attestation is in proper form, and that the seal thereto annexed is the seal of said Court.

Dated: May 20, 1974. /s/ SAMUEL D. LENOX, JR.
Judge

APPENDIX C

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

NO. 73-4702-CA DIVISION K

In re the marriage of

BRUCE E. BORRI, husband/petitioner, and ELAINE SIVERSON, previously known as Elaine Borri, wife/respondent.

PETITION FOR MODIFICATION OF
VISITATION RIGHTS

Comes now the wife, by and through her undersigned attorney, and files this her petition for modification of the court's order entered in this cause as to visitation rights and would show unto the court the following:

1. That the wife is fearful that the husband is operating in bad faith in connection with visitation rights and that in the event the wife should allow such visitation rights the husband will abscond from the State of Florida with the minor child and the wife will have no adequate remedy at law or in fact to enforce the Florida judgment.

2. The husband has told the wife on repeated occasions that no matter what any court order says he will take the child at the first opportunity and return to New Jersey so that the wife will never have the custody of the child regardless of any court order.

3. The husband has taken the child from the wife in the past and is fully capable and has the intent to so remove the child from the wife's custody at the first opportunity.

4. The wife personally does not object to the husband visiting with the child so long as there is sufficient security to protect the child's and the wife's interest in connection with retaining custody of the minor child of the parties in the wife.

WHEREFORE, the wife respectfully requests that this court only allow visitation of the minor child of the parties under court supervision and set forth necessary orders to accomplish such supervised visitation rights for the husband.

s LYMAN T. FLETCHER
SHEPPARD, FLETCHER, HAND & ADAMS
215 Washington Street
Jacksonville, Florida 32202
Attorneys for Wife

I HEREBY CERTIFY that a copy hereof has been furnished to Bill McCabe, Esquire, 17 South Lake Avenue, Orlando, Florida, by mail, this 13th day of November, 1974.

/s/ LYMAN T. FLETCHER
Attorney

APPENDIX D

IN THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA.

CIVIL ACTION NO. 73-4702 CA

DIVISION K

IN RE: THE MARRIAGE OF
BRUCE E. BORRI, Husband,
and ELAINE M. BORRI, Wife.

Filed: May 23, 1974

TEMPORARY CUSTODY ORDER AND RESTRAINING ORDER

The Court has heard seven hours of testimony in this matter and upon the request of counsel, the wife's attorney, Lyman T. Fletcher, Esquire, shall submit a memorandum on or before Wednesday, May 29, 1974, and the husband's attorney, E. E. Durrance, Esquire, shall submit a memorandum on or before 1:00 o'clock p.m., Friday, May 31, 1974, at which time both attorneys will appear for argument. Until said time, it is

ADJUDGED:

The minor child, Gregory Michael Borri, is remanded into the temporary custody of the wife, Elaine M. Siverson (formerly Borri) and she is enjoined and restrained from removing said minor child from the limits of Duval County, Florida, or to remove the residence of the minor child from 4800 Atlantic Boulevard, Apt. 161, Drake Apartments, Jacksonville, Florida.

It is further ADJUDGED that the wife shall have said minor child in the Chambers of this Court upon being notified by her attorney of the ultimate order entered herein.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida, this 23rd day of May, A.D., 1974.

/s/ JOHN E. SANTORA, JR.
JUDGE

Copies: E. E. Durrance, Esquire
1289 Kingsley Avenue, Suite 103
Orange Park, Florida 32073

Lyman T. Fletcher, Esquire
215 Washington Street
Jacksonville, Florida 32202

Elaine M. Siverson (formerly Borri)
4800 Atlantic Boulevard, Apt. 161
Jacksonville, Florida

Bruce M. Borri
Aqueduct Road
Riverdale, New Jersey 07457

APPENDIX E

IN THE CIRCUIT COURT
IN AND FOR DUVAL COUNTY, FLORIDA.

NO. 73-4702-CA DIVISION K

In re the marriage of
BRUCE E. BORRI, husband
and ELAINE M. BORRI, wife.

ORDER ON CUSTODY

The facts of this case are basically not in dispute. Chronologically the findings of fact follow.

The parties hereto, during the Spring of 1973, fell into marital discord. The respondent-husband was in the military service stationed in Jacksonville. Together with his wife and child he made his home in Orange Park. Anticipating his wife filing a petition to dissolve the marriage and seeking custody of their then 18 month old child, the father forcibly removed the child from the mother's custody and took him to New Jersey on May 21 or 22, 1973.

On May 23, 1973, the wife's petition was filed in this court wherein she sought dissolution, custody and other relief. The husband returned to Florida, was personally served, and defended the action. As a matter of fact, he prayed that the court award *him* custody of the child.

On August 27, 1973, the court entered Final Judgment dissolving the marriage but concluded that the child was beyond the jurisdiction of the Florida court. The husband was ordered to support the child. The court retained jurisdiction "for the purpose of reconsidering, enforcing or modifying any provision of this judgment", except the dissolution.

In September, 1973, the wife engaged counsel in New Jersey who filed petition for custody. On November 9, 1973, while the wife was in New Jersey, an "ex parte" order was entered by the New Jersey court with counsel for both parents present, (but neither parents) awarding the husband temporary custody of the child. That court then ordered a "social investigation" of both parents. The husband was interviewed one time in New Jersey; the wife one time in Florida by the Division of Family Services.

This court did not have the benefit of that investigation.

The New Jersey court held its first hearing on March 27, 1974, commencing sometime after the lunch hour and promptly recessed at 4:30 P. M. (which apparently is the judicial custom in New Jersey). The next hearing was May 8, 1974, and again recessed at 4:30 P. M. with neither side having concluded. The next scheduled hearing was May 20, 1974, but on May 9, 1974, the wife absconded with the child and returned to Florida, filing her petition to modify the Florida judgment and award to her the custody of her child on May 10, 1974.

On May 20, 1974, the New Jersey court entered an order indicating it had taken the testimony of all the parties

and their witnesses, and awarded custody of the child to the father.

Hearings were held on May 22 and May 23, 1974, consuming approximately six hours, at the conclusion of which the court had the child brought into the chambers and entered an order awarding the temporary custody of the child to the mother pending arguments of counsel on May 31, 1974.

Apparently the same witnesses who appeared or were scheduled to appear in the New Jersey court, appeared and testified in these proceedings.

Respondent-husband contends that this court must give full faith and credit to the New Jersey order of May 20, 1974. It is settled in Florida that judgments affecting the custody of minors are not entitled to recognition under the full faith and credit clause because they do not possess the requisite degree of finality. Powell v. Powell, 242 So. 2d 138 (D.C.A. 1, 1970). However, as stated in *Powell,* the order or judgment of a sister state "is entitled to great weight and respect under the doctrine of comity absent a showing by clear and convincing evidence that such new conditions have arisen since rendition of the decree as would justify a change in custody . . . . Application of the doctrine of comity is a matter of discretion with the trial judge and depends for its consideration upon the foreign court having had jurisdiction and having properly litigated the matter before it."

Respondent relies heavily upon the fact that the order awarding custody by New Jersey on May 20, 1974, was only three days before the Florida hearing of May 23,

1974, thus there could not have been any appreciable change in circumstances pertaining to the welfare of the child. He also relies upon the petitioner selecting New Jersey as the forum to seek custody and then ignoring that court and seeking another forum, citing Lambertson v. Williams, 61 So. 2d 478 (1952).

As to the time element, i. e. the May 20, 1974 foreign order, and the May 23, 1974 Florida hearing, this court is unimpressed for the reasons that the respondent ran from the Florida court in May, 1973. The petitioner, not knowing what the Florida court would do, stayed in Florida and litigated. As soon as that litigation terminated in August, 1973, she turned to the New Jersey courts. The order awarding temporary custody to the father was entered in November — two or three months after she initiated her efforts to gain custody. Five months later the first hearing was held. Two months later the second hearing was held . . . and a third hearing was scheduled eleven days away. For one year this mother has resorted to the courts. No wonder she was frustrated in New Jersey and removed her child where she had a right to believe that justice would not be delayed. It is common knowledge that Florida trial judges do not enjoy the luxury of 4:30 quitting time, particularly when dealing with a child and anxious parents who have been before the court for several months.

I do not consider the May 20, 1974 Order as the effective date for a change in circumstances. The effective date is November 9, 1973. Since that order was entered by New Jersey, the mother has remarried and has the care of a step-son one year older than her own. From a close observation of the parties and the child, particularly when the

child was before the court in the presence of his parents, and from other matters in the record, this court believes the welfare of the child will be served by placing him in the custody of his mother.

In Neal v. State, 135 So. 2d 891 (D.C.A. 1, 1961) our District Court of Appeals held that under the doctrine of comity whether the foreign decree should be recognized or not depends, at least in some measure, upon the manner in which the case was litigated which resulted in the foreign decree. It went on to state that "If the chancellor finds that in the case out of which the questioned judgment arose both parties were before the court and were accorded ample opportunity to fully develop and present their evidence on the custody issue, *such factor is one which the court may well consider in determining whether recognition of the judgment or decree should be granted.*" (Emphasis added)

In *Neal* (supra) the court, in a lengthy discussion of the law on this subject states that the public policy of Florida impels the view that in custody proceedings a decree of a foreign jurisdiction involving that issue shall give way to a decree based upon the best interest of the child involved.

In Morris v. Kridel, 179 So. 2d 130 (Fla. App. 2nd 1965) the Second District Court clearly set forth the rule in Florida on this issue:

> "[2] On remand, the trial judge may properly consider the New Jersey decree as a factor in deciding the custody issue. However, he is not bound by the full faith and credit clause to automatically enforce the New Jersey decree.

Under the comity principle the trial judge may, in his discretion, enforce the New Jersey decree, but only after he has determined whether it is in the best interests of the child to do so. We note several guidelines for determining whether a foreign decree is entitled to recognition under the comity principle in a custody case. They are: 1) the length of time which has elapsed since the decree; 2) whether the custody issue was actively litigated by the same parties now before the court; and 3) whether there has been a change in any material circumstances affecting the fitness of the parties relevant to the custody of the child.

[3] After considering all of the above the trial judge may, in the exercise of his discretion, decide that there is no reason to depart from the status established by the order of the sister state. Accordingly, he may then order custody to continue in the party vested with the child's care by the foreign decree. In the event the judge decides not to enforce the foreign decree, or believes that additional evidence is warranted, he may receive such further testimony as is necessary to determine the issue of custody . . . ."

Comity is not a rule of law, but one of practice, convenience, and expediency. It persuades, but does not command. It recognizes the fact that the primary duty of every court is to dispose of cases according to the law and the facts; in a word, to decide them right. In doing so, the judge is bound to determine them according to his own convictions. It is applicable only where, in his own mind, there may be doubt as to the soundness of his views. Mast, F. & Co. v. Stover Mfg. Co., 177 U. S. 485, 20 S.Ct. 708.

Cox v. Cox, 457 F. 2d 1190 (1972), although not on point exactly, is interesting in that a nomadic father deprived the mother of custody and visitation. There was a conflict of jurisdictions and the U. S. Court of Appeals, Third Circuit, stated that the plight of the mother "demonstrates the wisdom of a rule of law that affords continuing in personam jurisdiction in the original divorce court as a sort of home base to which, for purposes of child custody . . . the parties may on reasonable notice be required to resort." *Cox* further held that the original divorce court exercised its discretion in not deferring to the foreign jurisdiction, and affirmed.

It is my view that an interpretation opposite that which I have reached would lead to absurd consequences detrimental to the future welfare of a two year old child; accordingly, it is

ADJUDGED:

1. There has been a material change in circumstances since the entry of the New Jersey order of November 9, 1973, and the welfare of the child, Gregory Michael Borri, will best be served by placing him in the custody of his mother, the petitioner, and said child is placed in her custody and control.

2. The respondent-father shall have the right to visit with said child at reasonable times and places; however, in order to avoid further "theft" of a human being, the respondent is enjoined from removing the child from the boundaries of Duval and Clay counties without the written consent of the petitioner or this court.

3. The respondent shall pay to the petitioner as support for said child the sum of $100.00 per month, payable $50.00 on the first and fifteenth days of each month commencing June 15, 1974.

4. The respondent shall pay all medical and dental bills incurred by or in behalf of said minor child.

5. Petitioner's prayer for attorneys' fees and costs is denied.

DONE AND ORDERED in Chambers at Jacksonville, Florida, this 4th day of June, 1974.

/s/ JOHN E. SANTORA, JR.
CIRCUIT JUDGE

Copies: Lyman T. Fletcher, Esquire (2)
Attorney for wife-petitioner
E. E. Durrance, Esquire (2)
Attorney for husband-respondent

APPENDIX F

IN THE CIRCUIT COURT
IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO. 73-4702-CA

DIVISION K

In re the marriage of
BRUCE E. BORRI, husband
and ELAINE M. BORRI, wife.

ORDER DENYING REHEARING

Motion for re-hearing and amended motion for re-hearing has been filed by respondent-husband. The court heard argument of counsel, including the contention that Florida is in the minority in refusing to give full faith and credit to judgments of sister states in accordance with Article IV, Section 1 of the U. S. Constitution . . . when that judgment encompasses child custody. Without agreeing that Florida is in the minority, it appears that the law of this state regarding "comity" as opposed to full faith and credit, is by far the more sensible rule, as certainly every child custody decision is like a marriage — it suffers the possibility of changed circumstances. The excellent mother five years ago in state A may not be the same excellent mother today in state B.

Admittedly, Florida does appear to be in the minority on the question of jurisdiction over a child. Many states hold that the residence of the parents is the domicile of the

child, thus vesting the court which has jurisdiction over the parents with jurisdiction over the child. If Florida followed that theory, this custody fight would have been terminated when the final judgment dissolving the marriage was entered on August 27, 1973. But the conjunctive "if" is a word inapplicable to a fair and just conclusion to the series of unfortunate events which have circumvolved around the head and heart of this child and his parents.

Although not in evidence, respondent asked this court to read a transcript of proceedings before Honorable Kenneth C. MacKenzie, Judge of the Superior Court of New Jersey. Without objection the transcript was read. Interestingly, an outstanding child psychiatrist apparently testified that this child might suffer severe emotional problems because of disengagement from his mother. Also of interest was the New Jersey probation department's report to the court without knowledge that the petitioner had remarried.

I was very impressed with the findings as recited by Judge MacKenzie. He is no doubt a very scholarly and sincere jurist, but he erroneously, in my judgment, placed great emphasis on the fact that petitioner did not go to New Jersey until September, when the child was removed from her in May. The reason is obvious: she was litigating custody in Florida until August 27, and within one week thereafter, she was in New Jersey seeking further judicial relief.

The learned Chancellor in New Jersey hit the nail square on the head when he said, "Frankly, I think it is more important to evaluate the facts and determine

where the child is going to be better off and forget about case law, except as it may state the general proposition . . . ."

After observing the child enter my chambers, run to his mother, embrace her and exude that portrayal of dependence, trust and love — that was wholly lacking when he looked at his father and with no sign of recognition, I would not tear that child from its mother's arms.

This entire mess was started by the father's impropriety and compounded by the mother's . . . all to the detriment of a child whom they both love. Further detriment would occur to the future welfare of this child to remove him from his mother; therefore,

IT IS ADJUDGED that the motion for re-hearing is denied.

DONE AND ORDERED in Chambers at Jacksonville, Florida, this 5th day of July, 1974.

/s/ JOHN E. SANTORA, JR.
CIRCUIT JUDGE

Copies: Bill McCabe, Esquire (2)
Lyman T. Fletcher, Esquire (2)

APPENDIX G

ORDER FOR OUT-OF-STATE VISITATION,
POSTING OF BOND AND
DETERMINING ARREARAGE

In re the marriage of

BRUCE E. BORRI, husband
and ELAINE M. BORRI, wife,
now known as Elaine Siverson

This cause came on to be heard upon the petition of the husband for modification of visitation rights, upon motion of the wife to hold the husband in contempt for nonpayment of child support and further, upon the wife's failure to pay attorney's fee for husband's attorney as heretofore ordered. Both parties being present before the court with counsel and further, the minor child was present before the court, and the court having heard testimony of the parties and argument of counsel, upon consideration it is

ADJUDGED:

1. The husband shall have the right to visit with the child at his home in New Jersey for a three-week period upon posting of a $1,000.00 bond approved by the Clerk of this court and conditioned upon the husband returning the child to the mother at the conclusion of the three-week period at the Tampa airport.

2. The husband is found to be in arrears in the sum of $150.00 for child support payments not made pursuant to the court's order of November 27, 1974; but he shall be given a credit of $120.00 on that arrearage for clothing sent directly to the wife for the benefit of the child. The

remaining $30.00 of that arrearage shall be paid directly to the wife on May 1, 1975. The previously ordered child support of $30.00 per month shall continue in accordance with the court's order of December 2, 1974.

3. The husband shall have the right to visit with and be visited by the minor child beginning Friday, April 18, 1975 at 12:00 o'clock Noon through Sunday, April 20, 1975, at 12:00 o'clock Noon, in the Clearwater area.

4. The question of nonpayment of husband's attorney's fee is deferred pending the decision of the Appellate Court.

DONE AND ORDERED in Chambers at Jacksonville, Florida, this 17th day of April, 1975.

/s/ JOHN E. SANTORA, JR.
CIRCUIT JUDGE

Copies: Lyman T. Fletcher, Esquire (2)
Bill McCabe, Esquire (2)

APPENDIX H

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
JANUARY TERM, A. D. 1975

BRUCE E. BORRI,

Appellant,

versus No. W-201

ELAINE M. SIVERSON, Previously known as:
ELAINE M. BORRI,

Opinion filed June 18, 1975.

An Appeal from the Circuit Court for Duval County.
John E. Santora, Jr., Judge.

Bill McCabe, of Meyers, Mooney & Alder, for Appellant.
Lyman T. Fletcher, of Sheppard, Fletcher, Hand & Adams, for Appellee.

PER CURIAM.
AFFIRMED.

BOYER, Acting Chief Judge, MILLS, J. and MELVIN, WOODROW M., Associate Judge, CONCUR.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND DISPOSITION THEREOF IF FILED

APPENDIX I

In the Supreme Court of Florida
January Term, 1976
Monday, March 20, 1976

BRUCE E. BORRI,
Petitioner,
versus Case No. 47,718

ELAINE M. SIVERSON, p/k/a ELAINE M. BORRI,
Respondent.

ORDER ALLOWING CERTIORARI AND DISPENSING WITH ORAL ARGUMENT

The Petition for a Writ of Certiorari to the District Court of Appeal, First District is granted and oral argument is dispensed with pursuant to Rule 3.10 e Florida Appellate Rules.

The Clerk of the District Court of Appeal shall file the original record on or before April 13, 1976; the petitioner's brief shall be filed on or before April 13, 1976;

respondent's brief shall be filed on or before April 23, 1976; petitioner's reply brief shall be filed on or before May 3, 1976.

OVERTON, C.J., BOYD, ENGLAND AND SUNDBERG, JJ., CONCUR

ROBERTS, ADKINS AND HATCHETT, JJ., DISSENT

A True Copy
TEST:
Sid J. White
Clerk Supreme Court of Florida.
(SEAL)

CC: Hon. Raymond E. Rhodes, Clerk
Hon. Bill McCabe
Hon. Lyman T. Fletcher

APPENDIX J

In the Supreme Court of Florida
January Term, A.D. 1976

BRUCE E. BORRI,
Petitioner,

versus Case No. 47,718

ELAINE M. SIVERSON, ETC.,
Respondent.

Opinion filed June 16, 1976

Writ of Certiorari to the District Court of Appeal, First District

Bill McCabe of Meyers, Mooney and Adler, for Petitioner
Lyman T. Fletcher of Sheppard, Fletcher, Hand and Adams, for Respondent

PER CURIAM.

We issued a writ of certiorari in this cause. Upon reviewing the briefs and record, we are of the opinion that certiorari should not have been granted.

The writ is hereby discharged.

It is so ordered.

OVERTON, C.J., ROBERTS, ADKINS, BOYD, ENGLAND, SUNDBERG and HATCHETT, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DETERMINED

APPENDIX K

In the Supreme Court of Florida
Tuesday, September 7, 1976

BRUCE E. BORRI,
Petitioner,

versus Case No. 47,718

ELAINE M. SIVERSON, ETC.,
Respondent.

The Petition for Attorneys' Fees filed by attorneys for petitioner is denied, and the Motion for Attorneys' Fees filed by attorneys for respondent is denied, and

On consideration of the Petition for Rehearing filed by petitioner and Reply thereto, it is ordered that said petition is hereby denied.

A True Copy
TEST:
Sid J. White
Clerk Supreme Court.

(SEAL)

CC: Hon. Raymond E. Rhodes, Clerk
Hon. John E. Santora, Jr., Judge
Hon. Bill McCabe
Meyers, Mooney & Adler (Hon. Bill McCabe)
Sheppard, Fletcher, Hand & Adams
Hon. Lyman T. Fletcher

APPENDIX L

IN THE CIRCUIT COURT,
FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA.

IN RE: THE MARRIAGE OF
BRUCE E. BORRI, Husband,
and ELAINE M. BORRI, Wife.

CASE NO. 73-4702-CA DIVISION F

AMENDED MOTION TO DISMISS

The Husband, BRUCE E. BORRI, through his undersigned attorney, respectfully moves the Court to dismiss

Wife's Petition for Modification of Final Judgment and in support thereof shows unto the Court as follows:

1. Her Petition does not allege sufficient ultimate facts to show a material change in circumstances of the parties since entry of Final Judgment of Dissolution of Marriage, and therefore does not state a cause of action upon which her requested relief can be granted.

2. The Husband, BRUCE E. BORRI, has heretofore been granted the permanent custody of the minor child by Final Order of the Superior Court of New Jersey, in and for Morris County. The Wife, ELAINE M. BORRI, instituted the proceedings in the State of New Jersey and therefore submitted herself to the jurisdiction of that Court and is bound by its decision. *Lambertson et ux.* v. *Williams*, 61 So. 2d 478.

/s/ E. E. DURRANCE
E. E. DURRANCE
Attorney for Husband
1279 Kingsley Avenue
Suite 103
Orange Park, Florida 32073

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to LYMAN T. FLETCHER, Attorney for Wife, 215 Washington Street, Jacksonville, Florida 32202, by Hand Delivery this 22nd day of May, 1974.

/s/ E. E. DURRANCE
Attorney